IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.479 OF 2006

In

SUIT NO.1630 OF 1984

Sitadevi Mahendra Gupta : Appellant
(Orig. Defendant)

V/s.

Smt.Suvarna Mohanlal Vora : Respondent
(Orig. Plaintiff)

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Mr.Vivek Kantawala with Ms Ambreen Saheed and Ms Shweta Garekar i/b. Vivek Kantawala & Co., for the appellant.

Mr.Sharan Jagtiani with Mr.Mahesh Shukla i/b. M/s.Desai & Diwanji for the respondent.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATE : AUGUST 28, 2006.

ORAL ORDER (Per R.M.Lodha,J.)

1. The defendant is in appeal being aggrieved by the judgement and order dated 15.6.2006 whereby the learned trial Judge decreed the suit under Order VIII Rule 10 of the Code of Civil Procedure (for short the "C.P.C.") in terms of prayer clauses (a), (b), (c) and (d).

2. The respondent is the plaintiff. She claims to be the owner of a building by name "Paresh", together with land admeasuring 836 meters on which the building is erected, situate at Bhulabhai Desai Road, Mumbai. The defendant is alleged to be a trespasser in respect of a flat on 9th floor of the said building. From the averments made in the plaint, it is apparent that the defendant has been occupying the said flat since October 1972. The plaintiff, however, averred that the defendant has no right, title or interest in respect of the suit flat. The plaintiff has prayed for the following reliefs:-

> "a) It be declared that the Defendant had no right, title or interest in respect of the said Flat No.9 at ‘Paresh’ Building, 4A, Bhulabhai Desai Road, Bombay--400 026 and has been a trespasser in respect thereof.
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> b) The Defendant be ordered and decreed to vacate together with her belongings lying in the said Flat and hand over quiet and peaceful possession of the said Flat No.9, ‘Paresh’ Building to the Plaintiff.
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> c) That the Defendant be ordered and decreed to pay a sum of Rs.2,52,000/- as and by way of compensation for wrongful use and occupation of the said Flat as per particulars of claim as Exhibit ‘B’ to the Plaint.
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> d) That the Defendant be ordered and decreed to pay a sum of Rs.7,000/- every month till quiet, peaceful and vacant possession is handed over to the Plaintiff by the Defendant."

3. The defendant was served with the writ of summons and

it appears that on 15.1.1985, Mr.N.M.Shah, Advocate, put in an appearance and the suit was transferred to the list of Long Causes. Written statement was ordered to be filed within four weeks therefrom. No written statement was filed by the defendant within the time granted or thereafter. On 15.6.2006, the suit was posted before the learned trial Judge under the caption "for want of written statement". The counsel for the defendant prayed for permission to file written statement which was objected to by the counsel for the plaintiff. The learned trial Judge observed that the delay in filing the written statement must be explained in an affidavit. This having not been done, the oral request made by the defendant's counsel for permission to file written statement was rejected and the trial Judge granted a decree to the plaintiff under Order VIII Rule 10 of the C.P.C. in terms of prayer clauses (a) to (d) quoted hereinabove.

4. The judgement and order passed by the learned trial Judge may be reproduced as it is. This is what it reads:-

> "1. Heard learned counsel for the parties. Learned counsel for the Defendant prays for permission to file written statement. This is seriously objected by the counsel for the Plaintiff. Plaintiff's counsel points out that the written statement has not been filed for a period of more than 20 years. He also

invites my attention to my attention to the decision of the Supreme Court rendered in Kailash vs. Nanhku and ors. reported in 2005 (2) Mh.L.J. 775 in which it is laid down that oral request should not be entertained. The delay in filing of the written statement must be explained on an affidavit. This has not been done. In the circumstances the oral request for permission to file written statement is rejected.

2. The suit of the Plaintiff is decreed under Order 8 Rule 10 of C.P.C. in terms of prayer clauses (a) (b), (c) and (d). There shall be no order as to costs.

3. At the request of the learned counsel for the Defendant the operation of this order is stayed for a period of 4 weeks."

5. In Balraj Taneja v. Sunil Madan (AIR 1999 SC 3381), the Supreme Court considered the provisions of Order VIII Rule 10 of the Code of Civil Procedure and held that before passing a judgement against the defendant, it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgement could possibly be passed recording the Court’s satisfaction. The Supreme Court also referred to the provisions contained in Order XX Rule 4(2) and section 2(9) of the C.P.C. and held that judgement should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgement.

6. We are afraid, by no stretch of imagination, the impugned judgement can be said to meet the requirement of a judgement as contemplated under section 2(9) and Order XX Rule 4(2) of the C.P.C. As a matter of fact, the plaintiff even did not lead evidence to prove her case though the reliefs claimed relate to prayer for possession of a flat in a posh locality of Mumbai i.e. Bhulabhai Desai Road and a decree for compensation in the sum of Rs.2,52,000/- and a further decree in the sum of Rs.7,000/- per month till restoration of possession by the defendant to the plaintiff. Even as per the plaintiff's case, the defendant has been in possession of the said flat from 1.10.1972.

7. In appeal No.738 of 2005 (M/s.Commercial Union Assurance Company Ltd. & Anr. v. M/s.Afro Asian Associates & Ors.) decided on 11.10.2005, a Division Bench of this Court observed thus:-

> "18. The impugned judgement and order does not indicate that the learned Judge has followed the well settled principles of calling upon the plaintiff to prove his case, even in the absence of defendants, by placing requisite materials. This aspect is more relevant in this case because without any written statement the learned Judge has dismissed the claim against third respondent holding that it is time barred. He, partially allows the suit. When such is the fact situation, the learned Judge could not

have proceeded on the basis that the claim is undefended.

19. It is an undisputed fact that written statements of the appellants were declared as above and all that remained to be done was tendering the same on record. The prevalent practice of this Court appears to be that the written statements are declared and formally taken on record/filed when the suit reaches hearing. The period from the date of institution of the suit and trial is considerable in this case. Therefore, pleadings are often taken on record when the matter is set down for hearing and trial. In the interest of justice the learned Judge, therefore, ought not to have proceeded ex-parte i.e. in the absence of pleadings/written statement. The learned Judge ought to have exercised his discretion in such a manner so as not to deprive the present appellants of an opportunity to defend the claim on merits. It is not a case where no written statement was prepared or drafted and time was sought in that behalf when the matter reached hearing. This is a case where written statement was ready and declared but remained to be tendered on record. The discretionary power conferred on the Court by the provisions ought to be exercised in consonance with the settled principles of equity, justice and good conscience. The Court is not obliged to pronounce a judgement straightway but make other order as it deems fit. We need not go into these aspects in further details. However, it is necessary to reproduce the observations of Supreme Court in the case of Balraj Taneja Vs. Sunil Madan reported in AIR-1999-SC-3381 and also in case of Modula India Vs. Kamakshya Singh Deo reported in AIR-1989-SC-162, relevant observations are thus:-

> "**Balraj Taneja Vs. Sunil Madan** (AIR-1999-SC-3381):-
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> "14. This Rule, namely Rule 10, was also amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act No.104 of 1976). Prior to its amendment, it was held in a number of

decisions that the rule can be invoked only in those situations where the Court has required the defendant to file the written statement in terms of Rule 9 of Order 8. A few other High Courts had taken the view that this Rule would be applicable even to those cases where a written statement was required to be filed under Order 8, Rule 1, CPC. The conflict of decisions has been set at rest by providing specifically under this Rule that where a party from whom a written statement is required either under Rule 1 or Rule 9 of Order 8 fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgement against him or make such order in relation to the suit as it thinks fit. Rule 10 thus governs both the situations where a written statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the written statement has not been filed by the defendant, it will be open to the Court to pronounce judgement against him or make such order in relation to the suit as it thinks fit. It is to be noticed that if the written statement is not filed, the Court is required to pronounce judgement against the defendant. The words "against him" are to be found in Rule 10 of Order 9 which obviously means that the judgement will be pronounced against the defendant. This rule also gives a discretion either to pronounce judgment against the defendant or "make such order in relation to the suit as it thinks fit." These words are of immense significance, inasmuch as they give a discretion to the Court not to pronounce judgement against the defendant and instead pass such order as it may think fit in relation to the suit."

"29. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor the Court should proceed to pass judgment blindly merely because a

written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a written statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8, Rule 10, CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgement without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8."

"Modula India Vs. Kamakshya Singh Deo (AIR-1989-SC-162):-

"... ... ... An objection to our above conclusion has been raised on the basis of the provisions of Order VIII of the Code of Civil Procedure. Rules 1, 5 and 10 of this Order have been recently amended by the Amendment Act of 1976. We find nothing in these rules which will support the contention urged on behalf of the respondents. Rule 1 merely requires that the defendant should present a written statement of

his defence within the time permitted by the Court. Under Rule 5(2), where the defendant has not filed a pleading it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint except against a person under disability but the Court may in its discretion require any such fact to be proved. Again under Rule 10 when any party from whom a written statement is required fails to present the same within the time permitted or fixed by the Court, the Court "shall pronounce judgment against him or make such order in relation to the suit as it thinks fit." It will be seen that these rules are only permissive in nature. They enable the Court in an appropriate case to pronounce a decree straightway on the basis of the plaint and the averments contained therein. Though the present language of Rule 10 says that the Court "shall" pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the Court may think fit. Therefore, there is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of the plaintiff straightway because a written statement has not been filed. Reference was made before us to sub-rule (1) of Rule 5. This sub rule, however, has application only in a case where a pleading is filed but does not contain a specific or implicit denial of the averments contained in the plaint or other document to which it is a reply. Rule 5(1) cannot be made use of to sustain the contention that where there is no written statement the Court is bound to accept the statements contained in the plaint and pass a decree straightway. These provisions of the Code of Civil Procedure, far from supporting the contentions of the plaintiff that a decree on the basis of the plaint should follow a failure to

> file the written statement, rather indicate a contrary position, namely, that even in such cases, it is a matter for the Court to exercise a discretion as to the manner in which the further proceedings should take place. We, therefore, do not think that the terms of Order VIII in any way conflict with the conclusion reached by us."

20. Applying these settled principles to the facts and circumstances of the present case, we are of the view that the learned Judge was in clear error in decreeing the suit as far as appellants are concerned. The order passed by the learned Judge decreeing the suit as far as appellants before us are concerned, is therefore, liable to be interfered with and is hereby quashed and set aside. Rest of the order is not interfered with. As a consequence, the suit is restored to the file as far as present appellants are concerned and the same shall be disposed of on merits and in accordance with law. Needless to state that the written statement of the present appellants is taken on record and the learned Single Judge should proceed to dispose of the suit after framing necessary issues and in accordance with law. However, there shall be no order as to costs."

8. In a recent judgement delivered on 22.8.2006 in Appeal No.598 of 2006 (M/s.Meditronics Corporation of India & Ors. v. Dr.Mrs.Salima A. Rais), it was held by us thus:-

> "7. Does the impugned judgement meet the requirement of law, particularly section 2(9) and Order XX Rule 4(2) of the Code of Civil Procedure? That is one of the questions before us for consideration.
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> 8. The impugned judgement reads thus:-
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> > "1. This is an undefended suit against all the defendants. The Plaintiff has

> filed compilation of original document and affidavit of evidence in support of the claim. The allegations made in the plaint have gone uncontroverted. Consequently the Suit deserves to be decreed by virtue of the provisions of Order VIII Rule 10 of the Code of Civil Procedure.
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> 3. (sic) Suit is decreed in terms of prayer clause (a) and (d).
>
> 4. Decree be drawn up accordingly."

> We are afraid, by no stretch of imagination, the impugned judgement can be said to meet the requirement of a judgement as contemplated under section 2(9) and Order XX Rule 4(2). Though the original documents and affidavit of evidence seem to have been tendered by the plaintiff in the Court on that date, the impugned judgement does not indicate the consideration and analysis thereof. After all, the suit filed by the plaintiff is a suit for damages and the Court was required to see as to whether the affidavit that has been tendered by the plaintiff was sufficient to prove the plaintiff's case.
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> 9. On this count alone, the impugned judgement is required to be set aside."

9. The impugned judgement and order has to be set aside on this ground alone.

10. Besides that, it is an admitted case of the parties that on 15.6.2006 when the suit came up for consideration before the trial Judge under the caption "for want of written statement", the prayer was made by the counsel for the defendant for permission to file written statement. The written statement was prepared way back

on 21.2.1995. That is apparent from the declaration affirmed by Associate of this Court. In this back drop, the view of the learned trial Judge that delay in filing of the written statement must be explained on affidavit appears to be too harsh. Moreover, the Supreme Court in the case of Iridium India Telecom Ltd. v. Motorola Inc. (AIR 2005 SC 514) has held, with reference to Order VIII Rule 1 of the C.P.C., that limitation of 90 days for filing written statement does not apply to suits filed on Original Side of High Court. It is observed that Rules framed by High Court are protected under section 129 of the C.P.C. as regards proceedings on Original Side which need not be consistent with the provisions of the Code. Strictly speaking, therefore, the decision in the case of Kailash v. Nanhku & Ors.(2005 (2) Mh.L.J. 775) is not applicable to suit filed on the Original Side of the High Court.

11. The present appellant has filed additional affidavit before this Court. In paras 2, 4 and 5, the following statements have been made by the appellant explaining the delay in filing the written statement:-

> "2. I say that I am filing this limited Affidavit to bring on record certain events and facts that have taken place. At the outset I say and submit that the Written Statement has been affirmed on 21st February 1995. It would be impossible to believe that I would have concocted record

of this Hon'ble Court as alleged or at all. I say that I am presently residing in the suit premises from the year 1972 whilst instant suit has been filed in the year 1984. I say that I hail from a family in which my husband was jointly conducting business along with his brothers and his late father i.e. my father-in-law. I say that the said business was being conducted in the name and style of M/s.Himalayan Tiles and Marbles Private Limited which Company was into manufacturing of mosaic tiles and other building materials. The said Company had its property at Mahim and Jogeshwari and a manufacturing Unit in Imphal Manipur. It was at the beginning of 1985 that my husband's father expired which resulted into a huge dispute in the family vis-a-vis in the Company. Various take over bids by the brother of my husband resulted into litigation of various complaints as well as the entire take over bid and ouster of my husband resulting into tremendous tension and pressure of my household chores. This tension was predominantly because I had 4 daughters all on the pinnacle of youth. Disputes that were taking place at the work place and with an unsecured future my tensions arose. I say that my husband has been preoccupied in legal issues which legal issues came to an end by virtue of which my husband lost everything due to the frivolous litigations. I say that in the midst of 1980s various suits came to be filed against my husband which included a suit filed by State Bank of India based on a purported Guarantee which was misrepresented by my husband's brother as well as various other suits which included a suit being suit No.5777 of 1986 filed by my husband opposing acquisition proceedings by Bombay Telephones as it then was known through State of Maharashtra for acquiring the entire property situated at Mahim. Moreover my husband also initiated suit being suit No.2397 of 1985 in respect of cancellation of the transfer of reversionary rights belonging to my husband of property situated at Mahim to my husband's brother. This transfer was on the basis of concocted and fabricated

documents which my husband's brother had executed in his own favour. Incorrect and false representations were also made by my husband's brother in the State Bank of India matter which ultimately resulted in a decree of around Rs.25 lacs on M/s.Himalayan Tiles and Marbles Pvt. Ltd. which expenses were incurred and which left my house in a precarious position financially. It was during this tremendous period that my only son who accompanied my husband to take care of the manufacturing unit at Imphal also came to be kidnapped for extortion purposes somewhere in 1987 which resulted into further duress and trauma and tension in the entire family.

4. I say that I have duly and diligently carried out my duties. Since my husband was well entangled with legal battle and was well conversant with the legal battle, we had also perused the instant suit. This fact can be established from the Written Statement which is filed as far back as in 1995, as Constituted Attorney on my behalf which in itself means that all proceedings and procedures were well within his knowledge. I say that since he is no more I am in difficulty to explain the exact factual position as regards the period of 1985-1995 i.e. of the Order passed by this Hon'ble Court. I also wish to state that my husband was diligent and a careful person and would have definitely taken steps which are required legally which I feel that the passing of the Order for filing of the Written Statement would not have been within his knowledge. I say that as he is no more I cannot say but for the entire stress that the family has undergone through the period of 1980's resulting into entire wash out of the family business and the family disputes that had taken place immediately and the stress the entire family had undergone is the actual and correct and true position that has taken place.

5. I say that the fact of execution of the Written Statement in 1995 itself justifies the case put up by the Appellants as this is the Written Statement which was executed

> but not tendered in Court. I say that non-tendering would not be a fault of any party when the matter is entrusted to a pleader and formalities being completed which in the instant case is when instructions to the Pleader. I say that the contents of the Written Statement would prove that the facts which are pleaded thereat are the same facts which were prevalent in 1985, hence filing of the Written Statement later would not improve the case of the Appellants I who is residing in the suit premises being the only and solely property of mine and with this age of 71 and I am in twilight of my life would humbly submit and pray to this Hon'ble Court to condone the delay, if any, from the year 1985 till execution of the Written Statement till 12.2.1985 and invoke inherent powers of this Hon'ble Court as well as powers as more particularly set out in the Code of Civil Procedure 1908 and Bombay High Court Rules."

12. It is true that by not filing the written statement in time, the plaintiff has been inconvenienced and has to be compensated by reasonable costs. The counsel for the appellant, after seeking instructions, submitted that the appellant is prepared to pay costs of Rs.50,000/- for the inconvenience caused to the respondent.

13. We, accordingly, allow the appeal and set aside the judgement and order dated 15.6.2006, subject to the appellant paying costs of Rs.50,000/- (Rupees Fifty Thousand only) to the respondent within three weeks from today. Written statement shall also be filed by the appellant within three weeks from today.

14. Since the suit is of the year 1984 and is about 22 years old, we request the learned trial Judge to proceed with the suit expeditiously and endeavour to dispose of the same by 31.3.2007, if possible.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.